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In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES OF AMERICA, APPELLANT,

v.

PERRY HALSETH

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 211 Criminal T

UNITED STATES OF AMERICA

v.

PERRY HALSETH

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, and Rule 37(a) of the Federal Rules of Criminal Procedure the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the indictment.

OPINION BELOW

The opinion of the District Court dismissing the indictment has not been reported. A copy of the opinion is attached hereto as an appendix.

JURISDICTION

The order of the District Court dismissing the indictment was entered April 4, 1951. The juris-

diction of the Supreme Court to review on direct appeal an order of a District Court dismissing an indictment where such dismissal is based on the construction of the statute on which the indictment is founded is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. See also Rule 37(a)(2), F. R. Crim. P. The applicability of the Criminal Appeals Act to a situation where as in this case the indictment is amplified by an agreed statement of facts is established by the decision in *United States* v. *Lem Hoy*, 330 U.S. 724, 725.

QUESTION PRESENTED

Whether a punch board carrying an illustration of merchandise to be won as prizes, and a circular explaining how much merchandise can be obtained through use of the punch board, constitute mailings "concerning any lottery" within the intendment of Section 213 of the Criminal Code (now 18 U.S.C. 1302).

STATUTE INVOLVED

Section 213 of the Criminal Code (18 U.S.C., 1946 ed., 336) provided, in pertinent part, as follows:

> No letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance; * * * shall be deposited in or carried by the mails * * *. Whoever shall knowingly deposit * * * anything to be * * * delivered by mail in viola-

tion of * * * this section * * * shall be fined * * * or imprisoned * * *.

This section was reenacted as Section 1302 of the 1948 revision of the Criminal Code and now reads:

> Whoever knowingly deposits in the mail, or sends or delivers by mail: Any letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance; * * * Shall be fined * * * or imprisoned * * *.

STATEMENT

An 8-count indictment was returned against defendant in the United States District Court for the Eastern District of Wisconsin, each count charging that he violated Section 213 of the Criminal Code by causing to be mailed a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance. For the purpose of a motion to dismiss the indictment, the parties stipulated that certain materials offered as exhibits were mailed by defendant, and that such exhibits constituted the matter described in the indictment as circular letters. The District Court held that if the indictment had alleged the additional facts contained in the stipulation it would not have charged an offense under the statute. The Court accordingly granted defendant's motion to dismiss the indictment.

Four of the counts were based on material relating to radios, the other four on material relating to cameras. Since the nature of the mailings was the same except for the merchandise offered, it is sufficient to consider, as did the District Court, only the material relating to radios.

The mailings consisted of the following material:

(1) A sheet of paper bearing the letterhead of the Perry Sales Company on which was printed the following message:

> FOR YOU—A NEW, PERSONAL
> SUPERHETERODYNE RADIO *as a Gift*—
>
> You'll get many years of pleasure out of this SUPERHETERODYNE PERSONAL RADIO and here's how easily and quickly you can have one. *The quality features are described on the enclosed folder.*
>
> It's very simple. Merely show the circular and card to your friends, relatives, neighbors and co-workers. Explain to them how they may obtain one of these QUALITY RADIOS, for as little as 1¢ and not more than 39¢.
>
> The enclosed sales card has a list of names and under each seal is a number. For example Person selecting No. 1 pays 1¢; No. 6 pays 6¢; No. 11 pays 11¢; No. 21 pays 21¢; No. 31 pays 31¢; all others pay only 39¢. NONE HIGHER! Numbers are not consecutive.

TAKE ADVANTAGE OF THIS RARE OFFER BY WHICH YOU CAN OWN A NEW SUPERHETERODYNE RADIO.

How to send for your RADIO! Fill out the enclosed order form. Immediately upon receipt of the order we will rush to you Two (2) SUPERHETERODYNE RADIOS and THREE higher quality Rolpoint Ball Pens.

EXTRA GIFT FOR YOU! A well made Zipper Carrying Case *for your* Radio will be included if the order is received in 15 days.

When you receive your new SUPERHETERODYNE PERSONAL RADIO, you'll get years of enjoyment out of it, and you'll thank us many times for giving you this unusual opportunity.

Sincerely yours,

PERRY SALES COMPANY.

P. S. Should you be unable to take advantage of this offer, we would appreciate your cooperation in turning the enclosed over to a reliable friend. THANK YOU!

(2) A punch board which featured a picture of the same radio portrayed in the circular. The card also bore the following printed message:

Lucky name under seal received a ..... radio. Choice of 4 colors. No. 1 pays 1¢ No. 6 pays 6¢ No. 11 pays 11¢ No. 21 pays 21¢ No. 31 pays 31¢ All others pay only 39¢ NONE HIGHER

3 extra winners Nos. 22, 33, 44, each receives a Rolpoint Ball Pen $5 value

The face of the card revealed one larger size semi-perforated circle within which was printed, "Do not remove seal until entire card is sold", and 80 smaller semi-perforated circles in each of which was printed a three-letter common name. On the reverse side of the card were printed the 80 names, each with a line beside it, and below these, this message:

> This card contains eighty names. No. 1 pays 1¢, No. 6 pays 6¢, No. 11 pays 11¢, No. 21 pays 21¢, No. 31 pays 31¢, all others pay only 39¢. NONE HIGHER. This card is given to you absolutely free. You can use as Sales card if you wish. It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so. IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO AT ANY TIME.
>
> TOTAL $29.95
>
> POSTMASTER: This parcel may be opened for postal inspection if necessary.

(3) A circular extolling the radio.

(4) An order blank for two radios and three ball point pens.

(5) A printed return address envelope.

The District Court held that under Section 213 of the Criminal Code and the present 18 U.S.C. 1302, mailings "concerning any lottery" must re-

late to a lottery which is already in existence. It further held that, under the facts as stipulated, there would be no lottery unless the person receiving the material mailed by defendant put the punch cards to use, and that defendant's belief that the punch cards would be used did not bring the lottery into existence at the time the material was mailed. The court referred to the prior failure of the Post Office Department to apply the statute to similar mailings and to efforts of the Department to have the statute amended as further indication that the statute was not designed to reach material of the type involved in this case.

THE QUESTION IS SUBSTANTIAL

The issue presented by this appeal is one of importance in the enforcement of the laws preventing misuse of the mails. There have been an increasing number of attempts to sell merchandise through gambling schemes of the type here involved, with particular emphasis on the type of merchandise that appeals to young children. Under the decision of the District Court the Post Office Department would be powerless to prevent the use of the mails to further such attempts to stimulate gambling instincts.

The language of the statute, past and present, clearly covers the mailing involved in the instant case. A punch board is a plan offering prizes "dependent in whole or in part upon lot or chance." Defendant's circulars describing how to get mer-

chandise through use of the punch board are upon their face circulars "concerning" such a plan.

The District Court's interpretation of defendant's scheme as not relating to a lottery until the recipient puts the punch board to use is unrealistic. The scheme was set up and in operation when the mailings occurred. Defendant had fixed the prizes, determined the price, and established the machinery by which distribution was to be made. The fact that some recipients of the mailings might not make use of the punch boards did not change the character of the scheme as a plan for the distribution of prizes by lot. Persons to whom ordinary lottery tickets are sent may or may not buy such tickets. The lottery nevertheless exists. Here defendant sent out circular letters setting forth a plan for winning prizes by lot. Instead of selling chances himself, he deputized others to sell the chances. However, defendant's interest in the scheme continued, since he sent the merchandise offered as prizes only after the money received from selling chances had been collected and remitted. The difference between that plan and an ordinary lottery is a difference of form but not of essential character.

The decision of the District Court stems from a misinterpretation of the decision in *Stockton* v. *United States*, 205 Fed. 462 (C.A. 7), where the court held that the mail fraud statute (Section 215 of the Criminal Code) did not apply to the mailing

of a catalogue advertising for sale marked cards, loaded dice, etc. The court said that "the real scheme or artifice to defraud, if any, is that devised and perpetrated by the purchasers of the apparatus when they use it." There is, however, a marked difference between the mere selling of a gambling device and the type of scheme involved in the instant case. The seller of the gambling device makes his profit from the sale; he has no interest in the use to which the device is later put. Here defendant made not profit from the punch board as such; he made his profit from the money received from the sale of chances on the punch board. Not until the chances were sold did he receive his money. He set up the scheme and he received the proceeds of the sales by lot; he was thus the instigator and the real perpetrator of the lottery.

The District Court's reference to attempts to amend the statute reflects a similar failure to distinguish between the mere sale of gambling devices and a scheme to distribute merchandise through the use of a gambling device. The material quoted in the court's opinion shows that the effort to amend the statute was primarily directed toward overcoming the effect of the *Stockton* decision, which, as we have shown, is inapplicable to the facts in the instant case. In any event, no administrative or legislative inaction can undermine the force of the clear meaning of the statute to cover the acts charged in this case. See *Ex parte Collette*, 337

U.S. 55, 61; *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 52-53.

It is submitted that the decision of the District Court is erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted.

(S.) PHILIP B. PERLMAN,
Solicitor General.

MAY 1951.

APPENDIX

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN

No. 211 Criminal T

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PERRY HALSETH, DEFENDANT

OPINION

The defendant Perry Halseth was indicted and charged with having violated former Section 336, Title 18, U.S.C., which is now Section 1302, Title 18, U.S.C. The indictment contains eight counts. The first count of the indictment reads as follows:

> "The Grand Jury charges:
>
> "That on or about the 1st day of June, 1948, at Green Bay, Brown County, in the State and Eastern Judicial District of Wisconsin and within the jurisdiction of this Court,
>
> PERRY HALSETH,
>
> knowingly, wilfully and unlawfully did cause to be delivered by mail to Miss Lucia Brown a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided."

Each of the remaining seven counts is similar except that each count names a different person as the recipient of a circular letter and specifies the

date of the receipt and the place where the circular was received.

The defendant has moved for an order dismissing the indictment, as a whole and on every count thereof. For the purpose of the hearing on this motion of defendant, the parties stipulated to certain facts. They submitted as exhibits copies of the material referred to as circular letters in the various counts of the indictment, and it was agreed that the defendant did cause to be delivered, by mail, the circular letter thus described, to the person named in each count at or about the date indicated.

An examination of these exhibits discloses that Perry Halseth caused to be delivered to the persons named in Counts 1, 2, 7, and 8 the following material. There was a sheet of paper containing the letter head "Perry Sales Company, 417 S. Jefferson Street, Chicago 7, Illinois" and under this was printed the following message:

> "FOR YOU—A NEW, PERSONAL
> SUPERHETERODYNE RADIO AS A GIFT—
>
> You'll get many years of pleasure out of this SUPERHETERODYNE PERSONAL RADIO and here's how easily and quickly you can have one. *The quality features are described on the enclosed folder.*
>
> It's very simple. Merely show the circular and card to your friends, relatives, neighbors and co-workers. Explain to them how they may obtain one of these QUALITY RADIOS, for as little as 1¢ and not more than 39¢.
>
> The enclosed sales card has a list of names and under each seal is a number. For example

—Person selecting No. 1 pays 1¢; No. 6 pays 6¢; No. 11 pays 11¢; No. 21 pays 21¢; No. 31 pays 31¢; all others pay only 39¢. NONE HIGHER! Numbers are not consecutive.

TAKE ADVANTAGE OF THIS RARE OFFER BY WHICH YOU CAN OWN A NEW SUPERHETERODYNE RADIO.

How to send for your RADIO! Fill out the enclosed order form. Immediately upon receipt of the order we will rush to you TWO (2) SUPERHETERODYNE RADIOS and THREE higher quality Rolpoint Ball Pens.

EXTRA GIFT FOR YOU! A well made Zipper Carrying Case *for your* Radio will be included if the order is received in 15 days.

When you receive your new SUPERHETERODYNE PERSONAL RADIO, you'll get years of enjoyment out of it, and you'll thank us many times for giving you this unusual opportunity.

Sincerely yours,

PERRY SALES COMPANY.

P. S. Should you be unable to take advantage of this offer, we would appreciate your cooperation in turning the enclosed over to a reliable friend. THANK YOU!

The circular referred to in this printed message was a colored illustration and printed matter extolling the beauty and quality of a "medium size table model" radio. The sales card referred to was what is commonly known as a punch board. It also featured a picture of the same radio portrayed

in the circular. The card also bore the following printed message:

> "Lucky name under seal received a..... radio. Choice of 4 colors. No. 1 pays 1¢ No. 6 pays 6¢ No. 11 pays 11¢ No. 21 pays 21¢ No. 31 pays 31¢ All others pay only 39¢ NONE HIGHER"

There was then a short summary of the virtues of the radio. The front side of the card also contained this message:

> "3 extra winners Nos. 22, 33, 44, each receives a Rolpoint Ball Pen $5 value"

The face of the card revealed one larger size semi-perforated circle within which was printed: "Do not remove seal until entire card is sold", and 80 smaller semi-perforated circles in each of which was printed a three-letter common name. On the reverse side of the card were printed the 80 names, each with a line beside it, and below these, this message:

> "This card contains eighty names. No. 1 pays 1¢, No. 6 pays 6¢, No. 11 pays 11¢, No. 21 pays 21¢, No. 31 pays 31¢, all others pay only 39¢. NONE HIGHER. This card is given to you absolutely free. You can use as sales card if you wish. It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so. IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO AT ANY TIME.

TOTAL $29.95

POSTMASTER: This parcel may be opened for postal inspection if necessary.

Along with the aforementioned material, the persons named in the indictment received an order blank for the two radios and three ball-point pens and a printed return address envelope.

The persons named in Counts 3, 4, 5, and 6 of the indictment received similar material, except that the merchandise featured was a candid camera.

The defendant listed six grounds for his motion and at the oral hearing on the motion raised three additional objections to the indictment. The nine grounds thus put forward by the defendant may, for the purpose of discussion, be roughly classed into three groups and the defendant has adopted this classification in his briefs on the motion. The first major classification raises the question of whether on the face of the indictment an offense is charged. The second group alleges that if the indictment were informative and alleged the additional facts contained in the stipulation, no prescribed act would have been established. The third group of objections to the indictment rests on technical grounds. Because it seems to this court to be the decisive issue, the court shall first consider the second question of whether a proscribed act has been established.

Accepting the stipulation as revealing the full facts in regard to the mailing, we see that the defendant was engaged in the sale of merchandise to individuals and that to further his undertaking, he was encouraging and promoting the use of punch

boards by these individuals. The government has charged that the defendant's use of the mails in this respect constitutes a violation of law.

Former Section 336 of Title 18, U.S.C., which was in force prior to September 1, 1948, the effective date of the new Criminal Code provided in part:

> "No letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance; * * * shall be deposited in or carried by the mails * * * Whoever shall knowingly deposit * * * anything to be * * * delivered by mail in violation of * * * this section * * * shall be fined * * * or imprisoned * * *"

The present Section 1302 of the new Title 18, U.S.C., provides in part:

> "Whoever knowingly deposits in the mail, or sends or delivers by mail, Any letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance; * * * Shall be fined * * * or imprisoned * * *"

It is the position of the defendant that under either of the above statutes there can be no crime unless at the time the circular is mailed there is a lottery or similar scheme in existence or least definitely set up. In support of his contention he cites several cases. The strongest of these is the case of *United States v. Irvine, et al,* 156 Fed. 376. This

case arose under a statute which was essentially similar to that now under consideration. The defendant was charged with having mailed an advertisement of a lottery and demurred to the indictment. The court quoted from the opinion in *United States v. Bailey*, 47 Fed. 117:

> "I do not think this indictment defective for failing to show how and in what manner the circulars set forth in the several counts concern a lottery. It is sufficient, in my opinion, to charge in the words of the statute the fact that they do concern a lottery, without setting forth the evidence going to show that fact. But I think the indictment defective, because it fails to aver the existence of any lottery, or of an intention to hold any lottery or drawing for prizes to which the circulars set forth relate. The circulars upon their face do not show that they concern or in any way relate to a lottery. In such a case, the existence of a lottery, or of a scheme for a lottery, or of an intention to hold some lottery or drawing for prizes, to which the circulars relate, must be proved by other evidence than the circulars themselves. The fact should therefore be averred."

The court sustained the demurrer to the indictment in the Irvine case since it found that the indictment did not allege the existence of the lottery The court said:

> "* * * It is essential therefore that the existence must be alleged, as it must be proven to establish the offense. * * *"

The government has cited the case of *Boasberg v. United States*, 60 F. 2d 185, as authority for the proposition that the lottery or similar scheme need not be in existence at the time that the mailing of "a circular letter concerning a lottery or scheme" takes place. I have carefully studied the Boasberg opinion and I fail to find such an implication in its language. In that case the indictment charged that the defendant has mailed—

> " 'a circular and advertisement concerning a scheme offering prizes dependent upon lot or chance similar to a lottery addressed to George M. Carnes, etc., reading as follows: "Suburban Gardens Will Inaugurate a New Innovation for the Better People of New Orleans Keno $100.00 or More to the Winner Every Roll Commencing February 5th, 1930. Doors open at 6:30 P.M., first game at 7 P.M. M. Boasberg." ' "

The defendant was found guilty by a jury and he appealed. The appellate court first discussed the question of whether testimony that keno was usually played as set forth in the indictment was properly admitted. Then the court discussed the question of whether the indictment sufficiently described the scheme which the circulars concerned. Finally the court considered what it said was the real question in the case—whether a scheme to run keno games is a scheme offering prizes dependent in whole or in part upon lot or chance and similar to a lottery or a gift enterprise. The court decided each of the issues adversely to the defendant. The government in this case argues that the Boasberg case demonstrates that the statute can be violated

although the scheme offering prizes dependent upon lot or chance is to take place in the future. It must first be said, I think, that the Boasberg opinion does not discuss this question. Secondly, I feel that there is a substantial difference between the Boasberg case where the defendant who did the mailing had plainly indicated his intent to personally operate such a scheme and the instant case where the defendant who did the mailing could at best only hope that the punch boards would be used as he desired. I do not find that the Boasberg case lends any support to the position of the government in the case at bar.

The defendant in further support of his position that the existence of a lottery is an essential element of the crime which he is charged with having violated, cites the case of *Stockton* v. *United States*, 205 F. 462. The opinion in the Stockton case was written by Judge Geiger of this court sitting as a circuit judge. The statute involved was a companion statute to the one in question. It provided in part:

> "'Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States,'" etc.

The indictment charged the defendant with having mailed a catalogue advertising such gambling devices as marked cards and loaded dice to a pros-

pective purchaser of such equipment. The court held that assuming the marked cards and loaded dice were to be used by the purchaser to cheat or defraud in gambling nevertheless the seller did not violate the statute by sending the catalogue through the mail. The government in that case alleged that the defendant intended to induce one Moore and one Nichols to purchase gambling apparatus from him by sending them the catalogues, and that the defendant intended that said Moore and Nichols engage persons at play and defraud them. The court said:

> "* * * Now, if plaintiff in error had, through personal solicitation, sold or offered to sell this apparatus to Moore and Nichols; or if they had called at his place of business and entered into and concluded negotiations with him, there would in each case be present every element disclosed in the indictment. The *mailing* of the catalogue is not an element of the scheme; the arbitrary allegation of the intention of plaintiff in error that Moore and Nichols would engage persons in play, etc., is in effect an allegation of knowledge on his part that such purchasers would put the apparatus to a use for which it was obviously intended—and it adds and can add nothing unless and until by appropriate averment of facts it appears that he was to be in some relation of confederacy or participation, beneficial or otherwise, in such use. The real scheme or artifice to *defraud,* if any, is that devised and perpetrated by the possessors of the apparatus when they use it. The actual intent of the plaintiff

> in error was coextensive only with his transaction in selling or offering to sell;—and in case he sold—the subject-matter being disclosed and known—his whole intention and expectation would have been fully realized. His relation to the matter would have been at an end; and, granting that Nichols and Moore would or might defraud persons as alleged in the indictment, they would not do so upon the prompting nor in obedience to any act or intention of the plaintiff in error. * * *"

This language is applicable to the case at bar. There would be no lottery or scheme offering a prize dependent upon lot or chance unless the purchasers put the punch boards to use. While it is obvious that the defendant hoped and perhaps even had good reason to believe that the punch boards would be put to use, this hope or belief that there would be a "scheme" in existence does not make the mailing of the circulars in this instance a violation of the statute.

Still further evidence of the fact that the statute, properly construed, does not prohibit what this defendant has done is apparent from an examination of the legislative history of attempts to amend the statute. Thus, the record of a hearing before a subcommittee of the Committee on Post Offices and Post Roads of the United States Senate held on April 21, 1932 indicates the Post Office Department was then, and had for many years been sponsoring legislation to strengthen the anti-lottery laws to prohibit such mailing as that now in question. Quoting from that record we repeat the testimony of Mr. Calvin W. Hassell of the Post Office Depart-

ment in support of S. 182, a bill to amend Title 18, Sec 336, U.S.C. (the statute involved in the instant case):

"Mr. HASSELL. Legislation similar to that proposed in this bill, with the exception of the words referred to in this letter the chairman has just read, has been recommended by the Post Office Department for a great many years. The necessity for this legislation comes about by reason of the fact that the present lottery statutes, which are very broad when considered in connection with going lottery schemes, does not cover lottery devices and advertisements thereof.

"That came about by reason of the decision of the Supreme Court of the United States in France v. United States, in 1895 (164 U.S. 676), holding that matter relating to lotteries not set up and in operation was not within the lottery statutes.

"The provision with respect to cheating gambling devices is necessary by reason of the decision of the circuit court of appeals for the seventh circuit, in the case of Stockton v. United States, decided in 1913, in 205 Fed. 462. In the Stockton case, the purveyor of cheating-gambling devices through the mails was prosecuted under the fraud statutes (18 U. S. Code, 338), and his conviction was reversed by the circuit court of appeals, which held that the sale through the mails of cheating-gambling devices did not come within the purview of the postal fraud statute.

"The department has had a great many inquiries from individuals as to why the laws are so strictly enforced with respect to the transmission of matter through the mails relating to going lottery schemes, and yet lottery devices, including all of the prizes to be awarded, are mailable under the present law.

"Senator FRAZIER. It is the opinion, then, of the department that something of this kind is necessary to bar this so-called gambling paraphernalia from being eligible to the mails?

"Mr. HASSELL. Yes, Senator.

"SENATOR SHEPPARD: And literature and letters regarding it.

Senator FRAZIER. Yes."

The history of the administration of this statute indicates that while the statute itself (former Title 18, U.S.C., Section 336) declared that material concerning lotteries or gift enterprises or similar schemes offering prizes dependent in whole or in part upon lot or chance shall not be deposited or carried in the mails or delivered by any postmaster or letter carrier, the Post Office Department has not seen fit to apply the statute to the type of material involved in the instant action.

In the light of all of this background, the prior court decisions and the legislative and administrative history, I feel that the court cannot now find that the statute applies to the type of material sent by the defendant without, in effect, rewriting the statute. This would be obviously improper because it is fundamental that it is to the Congress and not the courts to which we must apply for changes in our Federal laws. Justice demands that a change

in the law be announced by Congress so that the citizenry will know what they must do or not do in the future. To say that this indictment charges an offense is, in effect, therefore to enact an ex post facto law. This we will not do.

Ordinarily this opinion would now be concluded by setting forth the mandate of the court. However, the implications of this opinion constrain me to make one final observation.

In the promotion of his merchandise this defendant makes a well calculated appeal to the gambling instincts of his prospective purchasers through the enclosure of the device with which each could conduct a little game of chance. This sort of appeal, I presume, finds some acceptance among people of every kind and description, but I venture the opinion that the great majority of the punch boards that are actually used are those which fall into the hands of children of tender ages. The serious moral implications involved are too apparent to require laboring on my part.

The postal authorities have been fully aware of this evil and have repeatedly asked Congress to plug the loopholes exposed by earlier court decisions, but Congress has not yet seen fit so to do.

During these past few months the Congress, through a committee of the Senate has been making an investigation of gambling, and other types of vice with the end in mind of the enactment of Federal legislation to deal with this problem. The state of the law relative to the use of the mails for distributing devices which are designed for gambling uses should be referred to if it already has not. The tremendous impact of the revelations of the Committee upon the citizens of this country has created

a climate insuring passage of wholesome legislation designed to stop these evil practices.

The motion of the defendant will be granted. Counsel for the defendant will submit an order in conformity with this opinion.

Dated at Milwaukee, Wisconsin, this 3rd day of April 1951.

ROBERT E. TEHAN.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 891028 698